

**BASIL KALAFANOVA TRADING AS B. KALAFUL SHOP ~V~ ELLEN KOFANA TRADING AS EDK STORE**

High Court of Solomon Islands  
(Palmer J.)

Civil Case number 47 of 2001

Hearing: 12<sup>th</sup> –13<sup>th</sup> August 2002

Judgment: 14<sup>th</sup> November 2002

*A. Radcliffe for the Plaintiff*

*A & A Legal Service for the Defendant*

**Palmer J.:** This is a dispute over ownership of a general retail store at Auki, Malaita Province. The Plaintiff, Basil Kalafanova trading as B. Kalaful Shop claims he is the rightful owner of the store. He says he initiated the idea of starting a general retail store at Auki through discussions he had with Zheng Dingwen (“Zheng”) a Chinese expatriate. He says he first met Zheng at the Kukum Police Station sometime in August 2000. He was selling wristwatches. Zheng had been a former employee of Tongs Corporation Limited. Plaintiff says he discussed with Zheng the idea of setting up a general retail store at Auki and having him employed as manager to run the store. The store was then set up on that basis. Unfortunately no written agreement was drawn up to confirm their discussions and to make clear what their relationship was to be, whether that of a partnership or of an employer/employee relationship. The arrangements were verbal. Naturally such arrangement was bound to be fraught with misunderstandings and misconstructions.

Following this, the Plaintiff says he obtained a business licence from Malaita Province (Exhibit “BK2” annexed to the same affidavit of Basil Kalafanova) on or about 9<sup>th</sup> October 2000. On 16<sup>th</sup> October 2000 he registered his business name “**B. Kalaful Shop**” under the Registration of Business Names Act 1971 (Exhibit “BK1” annexed to the affidavit of Basil Kalafanova filed 4<sup>th</sup> April 2001). On 17<sup>th</sup> October 2001 he executed a tenancy agreement with David Ganifiri (now owned by Malaita Development Authority), for the rent of premises, which formed part of Parcel No. 171-001-343 (see copy of the tenancy agreement marked as “BK3” annexed to the same affidavit of Basil Kalafanova) and commenced business thereafter.

Plaintiff says that he also arranged for the work and residence permits of Zheng to be processed. He engaged Employment Consultant Agency operated by Mr. Belanie Tekulu (see copies of correspondences relating to this in Exhibits “EK3”, “EK4”, “EK6”) for this.

In November 2000, he says Zheng introduced the Defendant as a shop assistant. Unbeknown to him however, the Defendant had registered a separate business name “EKD Store” and thereafter virtually took over the operations of the store as that of hers and Zheng. Plaintiff described the actions of the Defendant and Zheng as a “hijack” of his business.

He comes to court for orders inter alia for re-possession of the premises, delivery and return of all the stock to him, an account of all the stock sold by the Defendant with effect from 1<sup>st</sup> February 2001, and damages for conversion and/or trespass.

Defendant on the other hand says in her defence and counter-claim filed 16<sup>th</sup> May 2001, that the actions of the Plaintiff in relation to the registration of the business name (paragraph 2 of the Defence) and purchase of the business licence (paragraph 3 of the Defence) were done with intent to defraud her. She says that the execution of the tenancy agreement by the Plaintiff was supposed to be that of an agent of the Defendant. Instead Plaintiff inserted the name B. Kalaful Shop, with intent to defraud her

(paragraph 4). She claims the Plaintiff was caught in October 2000 misappropriating goods and moneys from the general store (paragraph 6). She also claims she is the owner of the store from the beginning (paragraph 7 of her Defence).

In her Counter-Claim, she further says that around September 2000 she and Zheng approached the Plaintiff for advice on starting a business (paragraph 13). Plaintiff advised them to obtain a business licence and to register a business name. She says she did this on 1<sup>st</sup> September 2000. Plaintiff then asked them to give him \$2,700-00 to obtain a Work and Residence Permit for Zheng. She claims the Plaintiff mis-used the money instead to register his own business name (B. Kalaful Store). She only became aware of this in October 2000. She gives this as the reason for the delay in the registration of her business name "EKD Store" in November 2000. She also alleges that the Plaintiff had lied to them about arranging things for EKD Store when instead he was trying to employ Zheng personally for his business. She says the Plaintiff had abused his position of trust and counter-claims inter alia for the refund of the sum of \$12,000-00, restraining orders against the Plaintiff, damages, costs and interest.

The Defendant's Defence can be summed up basically as follows. That she and Zheng were the ones that had initially approached the Plaintiff regarding the set up of their business but that instead the Plaintiff had abused his position of trust and distorted the facts to register his own business and claim the business as his own.

### **The Issues**

The issues for determination by this court are quite simple. They turn on questions of evidence and fact especially on questions of credibility, as to whose version the court accepts, whether it is the Plaintiff's version that the business belonged to him and that he had employed Zheng as his manager, or the Defendant's version, that she and Zheng had started the business from the beginning.

Plaintiff called two witnesses in support of his case apart from himself whilst the Defendant called two witnesses including herself.

### **Assessment of Evidence**

I have listened carefully to the evidence of the parties and considered all the affidavit material filed in support, as well as the pleadings that have been filed. I find the evidence adduced by the Plaintiff to be clear, consistent, credible and uncontradicted.

For instance, his evidence regarding plans to start and commence a business and to employ Zheng as manager of the said store has not only been unchallenged but has also been corroborated by other witnesses. Sgt. Patteson Maegonia, a police officer testified that he was present at Kukum Police Station when Zheng and the Plaintiff initially discussed the idea of setting up a retail store at Auki. He confirmed that he saw Zheng and the Plaintiff meeting at the Kukum Police Station on several occasions. He himself also spoke with Zheng. He described their discussions as referring to some kind of partnership in business. He also confirmed that he saw Zheng and the Plaintiff in Auki after they had commenced business operations. There was no mention of the Defendant having been seen during those times!

Another crucial witness, Jack Alufurai testified that he and another person renovated the premises at Auki in the month of September 2000 before it was opened for business. He had been asked to do this by the Plaintiff, not the Defendant. He also testified that after the store was opened, the Plaintiff not the Defendant asked him to continue working as a shop assistant. He gave unchallenged evidence to the effect that he never saw the Defendant at the premises throughout the renovation period and during the commencement of the business and its earlier period. He says he only saw her come in to the store in November 2000. He was still working there when she joined them. He finished working in February

2001. He became aware of some sort of ownership change only after the Defendant joined them in November 2000 when Zheng told him about it.

Further evidence of ownership of the business in favour of the Plaintiff is supported by the registration certificate (see Exhibit "BK1" annexed to the affidavit of Basil Kalafanoa filed 4<sup>th</sup> April 2001), which showed Plaintiff as the sole proprietor of the said business.

Other supportive evidence can be seen in the documentary evidence exhibited in the affidavit of Ellen Kohana (the Defendant herself) filed 25<sup>th</sup> April 2001. Exhibit "EK3" is a letter dated 3<sup>rd</sup> October 2000 written by Belanie Tekulu to the Commissioner of Labour in respect of Zheng's application for a work permit. At paragraph 1 he wrote:

*"Please find enclosed is our application to enter and reside in respect of Dingwen Zheng. Mr. Dingwen Zheng is a former employee of Tongs Corporation and has resigned and will now be employed by Kalaful Shop at Auki as a manager."* (Emphasis added)

This was repeated in another letter dated 16<sup>th</sup> October 2000 (Exhibit "EK4"). I quote paragraph 3:

*"After he resigned from Tongs Corporation, a local company by the name of KALAFUL SHOP in Auki wished to engage him as a Shop Manager."* (emphasis added)

Nothing could be clearer from the above statements. Not only are they consistent with and support the evidence of the Plaintiff but it is significant that nothing is said about the Defendant or EKD Store in that period.

Further a number of invoices (Exhibits P1, P3, P6, and P7) showed that the name B. Kalaful Shop was used for the order and purchase of cargo. The only slight discrepancy is the references to an "O Zheng Store - Auki" (Exhibit P2), "O Zhing-Auki" (Exhibit P4 and P5). However, the Plaintiff has provided explanation confirmed by Zheng himself that when orders were made, Zheng used his own name. Again it is significant nothing whatsoever was said or referred to in those invoices in relation to the Defendant or EKD Store.

Further, the evidence of Zheng himself during examination in chief confirmed the evidence of the Plaintiff that the initial discussions about starting a business were made between them and not with the Defendant. Zheng confirmed that at that time they had not met the Defendant. Under cross-examination he confirmed further that at that time he and the Defendant had not yet gotten married. Under further cross-examination he admitted that he was asked by the Plaintiff to go to Auki and work for him. He also further admitted that the Plaintiff was his boss! He also confirmed that the Defendant joined them in November 2000.

In contrast, I find no evidence to support the claims of the Defendant that she and Zheng started the business from the beginning. She has made outlandish claims tantamount to being scandalous against the Plaintiff with no evidence to support them. For instance, she alleges in paragraph 2 of her Defence that the registration of the business name B. Kalaful Shop was done to **defraud** her. She has however produced no evidence whatsoever in support of this allegation. To the contrary, her own evidence in chief and under cross-examination has been to the effect that she was not aware of any prior dealings between Zheng and the Plaintiff and as to the commencement of the business. She could not have been in any event as according to her own evidence under oath and contrary to what she had sworn in her affidavit filed 25<sup>th</sup> April 2001 at paragraph 3, she says she only met up with Zheng in September of 2000! Note in paragraph 3 of her affidavit she had deposed that she met Zheng in mid 2000 and that the idea of starting up a business was hatched in September 2000. Unfortunately the evidence adduced showed that Zheng met up with the Defendant only after the store had been set up at Auki.

Also in paragraph 3 of her affidavit she deposes that she and Zheng approached the Plaintiff to find out whether it was all right for Zheng to run a business. Not an iota of evidence has been produced in support of this. In fact under cross-examination she expressly denied meeting the Plaintiff. I quote:

*Q. Did you see Basil?*

*A. No.*

*Q. So what is true?*

*A. Zheng and me went to ...*

*Q. To where?*

*A. Repeat question.*

*Q. Did you see Basil about starting the business?*

*A. No."*

Also at paragraph 4 of her affidavit she deposes:

*"The Plaintiff advised me to first pay a business licence and to register a business name immediately."*  
(emphasis added)

Under cross-examination, she was asked if the Plaintiff did advise her regarding payment of the business licence and registration of the business name. Again her response was a clear no. When she was asked if what she had written was not true, she had nothing to say. I find her evidence to be evasive, confused and to a certain extent deceptive.

The Defendant had also admitted under cross-examination herself that she was not involved in anyway in the earlier dealings between Zheng and the Plaintiff. She conceded entering the scene only after the initial arrangements between the Plaintiff and Zheng had been concluded and only after she had gotten married to Zheng (in September 2000) and was brought in to work in the shop by Zheng. According to her evidence under cross-examination she confirmed that when she came into the store it already had cargo in it. This is consistent with the unchallenged evidence of the Plaintiff and Jack Alufurai that she had started off initially as a shop assistant in November 2000.

It appears from the evidence adduced before this court, that Zheng may have painted quite a different picture to her about ownership of the said business, perhaps to the effect that he was the owner and not the Plaintiff. That is not to deny Zheng's contribution to the business in terms of his expertise and capital investment. I accept Zheng's contribution to the commencement and success of the business cannot be discounted. He played a vital role as the manager and being a Chinese it seems he was able to get preference treatment with other Chinese vendors for purposes of ordering cargoes on credit. Had it been the Plaintiff, it may have been much more difficult. He also had put in money to kick-start the business.

The evidence adduced also showed that somewhere down the line, some sort of misunderstanding between the Plaintiff and Zheng must have occurred and which resulted in what the Plaintiff describes as the business being hijacked by the Defendant and Zheng. There was a fall out in their relationship and business dealings. It appears Zheng may have viewed their relationship as more of a partnership in view of his contribution by way of management expertise and monetary contribution to the running of the

business. The exact period when this fall out occurred was not specified in evidence but some guidance can be gleaned from the correspondences in Exhibits "EK6", "EK7" and "EK8" annexed to the affidavit of Ellen Kohana filed 25<sup>th</sup> April 2001. It is clear that towards January/February 2001, the store was now being run completely by the Defendant and Zheng. There appear to be some misunderstanding as to how this came about. According to the evidence of Zheng, he had bought out the Plaintiff. Further it seems that he felt he was entitled to do this in any event as in essence he was the one running the show from the beginning.

Nevertheless the evidence adduced before this court has shown on the balance of probability that the business was commenced and registered in the name of the Plaintiff and that Zheng had been engaged as manager of the business. After Zheng got married to the Defendant however, he virtually took over the business under the name of his wife, the Defendant.

### **The Counter-Claim of the Defendant**

The Defendant counter-claims inter alia for a refund of the sum of \$12,000-00, being for \$2,700-00 given to the Plaintiff to organize the work and residence permits of Zheng and registration of the business name, \$5,300-00 for goods and cash taken by the Plaintiff for his personal use and \$4,000-00 for work done by him to help the Defendant start the business.

I accept there is evidence to support the claim by the Plaintiff that some money was used to process Zheng's application. Unfortunately I am not satisfied it has been proven on the balance of probability that this money was mis-used or misappropriated in any way by the Plaintiff. There is evidence, which showed it was used for the purpose given, that the Plaintiff did engage Employment Consultancy Agency to process the said application. To that extent I am not satisfied the claim for a refund should succeed.

With respect to the claim for \$5,300-00, the evidence adduced in support of this is vague, ambiguous and unsubstantiated. Insufficient evidence has been adduced in support of this allegation. To that extent also it must be denied.

Finally on the claim for \$4,000-00, the Plaintiff confirms receiving this amount but says that this was an advance for 4 months salary. There is evidence to show that the Plaintiff and Zheng were receiving \$1,000-00 per month as their salary. No issue has been raised on the question whether the Plaintiff was entitled to receive this amount as an advance for four months or not or whether he had been paid for those four months and therefore not entitled to receive the said money. On the balance of probability I am not satisfied that this amount should also be granted.

### **Conclusion**

I am satisfied on the evidence before me that the Plaintiff was the sole proprietor of the business B. Kalaful Shop and that he had engaged Zheng as manager. I am satisfied as well on the evidence that Zheng contributed significantly to the commencement and operations of the shop in terms of management expertise and monetary contributions.

I accept there was a fall out which occurred sometime in November/December 2000 and that thereafter January/February 2001, the Plaintiff was ousted without any proper settlement being conducted between the parties. To that extent the Plaintiff should be allowed to continue with his business operations in the premises that he had originally rented for his business. The Defendant should be allowed 14 days to vacate the premises.

Unfortunately, I am not satisfied he is entitled to the delivery of all stock listed in the inventory as at 10<sup>th</sup> May 2001. I have found that the operations of the business with effect from January/February 2001 were virtually that of the Defendant and Zheng. Much of the inventory listed accordingly would have

been obtained through the hard work, effort and input of the Defendant and Zheng. The evidence adduced showed that Zheng contributed much to the commencement and operations of the business. To that extent, the most appropriate order would be for a split of 35:65 in the inventory list as of 10<sup>th</sup> May 2001, in lieu thereof 40% of \$100,000-00 being damages for conversion. If he elects for the payment of \$40,000-00 damages, then 28 days should be given for this payment to be made.

I note the Plaintiff has also claimed damages for trespass. In my respectful view only nominal damages should be awarded in favour of the Plaintiff to be determined in chambers if not agreed. I also grant interest at the rate of 5% with effect from February 2001 plus costs.

#### **ORDERS OF THE COURT:**

- 1. Dismiss counter-claim of the Defendant.**
- 2. Grant order for immediate possession of the shop premises in Parcel Number 171-001-343 subject to the new owners of the property, Malaita Development Authority consenting thereto. The Defendant to vacate the premises within 14 days.**
- 3. Either award 35% of the stock listed in the inventory as at 10<sup>th</sup> May 2001 or in lieu thereof \$40,000-00 for damages for conversion payable within 28 days.**
- 4. Award nominal damages for trespass.**
- 5. Award interest at the rate of 5% with effect from February 2001.**
- 6. Costs of the Plaintiff to be borne by the Defendant.**

**THE COURT**